

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4
5 PATRICIA AIKEN,

6 Plaintiff,

7 vs.

8 THOMAS M. SNEE, *et al.*,

9 Defendants.
10

2:15-cv-00227-JAD-VCF

ORDER AND
REPORT & RECOMMENDATION

11 This matter involves *pro se* Plaintiff Patricia Aiken’s claim for breach of contract against
12 Defendants Thomas M. Snee, Hahn Ngyen, Ionetics, Inc. (“Ionetics”), Angioprism, Inc. (“Angioprism”),
13 and Cardioprism, Inc. (“Cardioprism”). Before the court is Plaintiff’s Application to proceed *in forma*
14 *pauperis* (#1¹) and Complaint (#1-2). For the reasons discussed below, Plaintiff’s Application to
15 proceed *in forma pauperis* is granted and it is recommended that her Complaint be dismissed with
16 prejudice.

17 **BACKGROUND**

18 The following allegations are taken from Plaintiff Aiken’s Complaint (#1-2 at 1-5) and an
19 affidavit from August 12, 2013 (*Id.* at 6-15) incorporated by reference within (*Id.* at 4: ¶11) and attached
20 to the Complaint. They are presented as if they are true.²

21 Defendant Snee recruited Plaintiff around December 31, 2009 by phone to work for him in Las
22 Vegas, offering to provide her a house, car, and “opportunity to make a lot of money.” (#1-2 at 6: ¶1).
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24 ¹ Parenthetical citations refer to the court’s docket.

25 ² In evaluating whether pleadings state a plausible claim for relief, courts generally accept the allegations as true.
Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

1 Plaintiff arrived in Las Vegas, from Spokane, Washington, to begin work on January 9, 2010. (*Id.*).
2 Plaintiff worked for Defendants Snee, Ionetics, Angioprism, and Cardioprism for three-and-a-half years.
3 (*Id.* at 3: ¶1). Plaintiff marketed Cardioprism through the internet, a weekly radio show, and contact with
4 alternative care physicians. (*Id.* at 8: ¶11-¶12). Plaintiff managed the herb/encapsulation room and
5 worked on marketing for Angioprism. (*Id.* at 9: ¶15-¶16). Plaintiff was also involved with marketing for
6 Ionetics (*Id.* at 9: ¶17).

7 Plaintiff provided services to Defendant Snee. She assisted with his computer, including
8 transporting his computer to and from the local repair shop. (#1-2 at 9: ¶14). In August of 2011, Plaintiff
9 began piloting and working on plane maintenance for Defendant Snee. (*Id.* at 10: ¶19-¶20). Plaintiff has
10 advised Defendant Snee on natural remedies, administering Reiki treatments at his home sometimes four
11 to five times a week. (*Id.* at 10: ¶21). Plaintiff provided services on Defendant Snee's RV. (*Id.* at 11:
12 ¶23).

13 Plaintiff worked "without compensation" (#1-2 at 3: ¶4) based on Defendant Snee's "repeated
14 promises" to will Cardioprism to Plaintiff. (*Id.* at 3: ¶5). The promises were oral. (*Id.* at 4: ¶5). The "only
15 compensation" Plaintiff has received for her work has been rent, utilities when she has not had a
16 roommate to defray the cost, a debit card for expenses such as gas and food, and "sporadic cash of
17 usually \$100 or \$50." (*Id.* at 11: ¶22). When beginning to work for Defendants in January 2010, Plaintiff
18 was provided a one-room, 465 square-foot unit at a Budget Suites. (*Id.* at 6: ¶1; 7: ¶8). On July 15, 2012,
19 Plaintiff moved into a 2800 square foot town home. (*Id.* at 7: ¶8 & 8: ¶9). Defendant Snee or one of the
20 Defendant companies paid Plaintiff's rent throughout this period. (*Id.* at 8: ¶10). A car was rented for
21 Plaintiff beginning in April 2010. (*Id.* at 6: ¶2). Some time later, Defendant Snee purchased a car for
22 Plaintiff's use. (*Id.* at 6: ¶3).

23 Defendant Snee was hospitalized on June 23, 2013. (#1-2 at 7: ¶4). Plaintiff states that he began
24 to act irrationally at this time. (*Id.* at 7: ¶5). He also stated "that he was turning the business over and
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1 would call the bank and make [Plaintiff] a signer on the Cardioprim account.” (*Id.* at 7: ¶6). He returned
 2 to the hospital and never “fulfilled that agreement.” (*Id.*). Defendant Snee has been diagnosed with brain
 3 atrophy. (*Id.* at 11: ¶24). According to Defendant Snee’s agent Layne, Defendant’s companies are “all a
 4 house of cards.” (*Id.* at 12: ¶29). When trying to discuss safeguarding the companies, Defendant Snee’s
 5 son was hostile to Plaintiff. (*Id.*).

6 Plaintiff has come to feel that her “wellbeing is in jeopardy.” (#1-2 at 15: ¶38). Defendant Snee
 7 failed to pay for contracts that Plaintiff signed for, resulting in “collections against” Plaintiff. (*Id.* at 9:
 8 ¶13 & 4: ¶9). Defendants Snee and Ngyen failed to pay Plaintiff’s rent, fix Plaintiff’s car, or put money
 9 into the account that Plaintiff uses for expenses in August 2013. (*Id.* at 11: ¶25). There are no allegations
 10 specifically raised about the period after August 2013. Feeling that the actions of 2013 terminated her
 11 employment (*Id.* at 4: ¶6-2), Plaintiff requests judgment against Defendants for \$200,000 for labor,
 12 punitive damages, and relief from Defendant Snee’s agent Layne Barlow. (*Id.* at 5). Plaintiff Ngyen is
 13 included as a Defendant because Plaintiff has placed his property under her name and she is his business
 14 partner. (*Id.* at 4: ¶7). All Defendants have breached or were co-conspirators in breaching the oral
 15 contract and have received unjust enrichment. (*Id.* at 4: ¶10). Plaintiff requests a hearing for all matters
 16 concerning her Complaint. (*Id.* at 5).

17 DISCUSSION

18 Plaintiff’s filings present two questions: (1) whether Plaintiff may proceed *in forma pauperis*
 19 under 28 U.S.C. § 1915; (2) whether Plaintiff’s Complaint states a plausible claim that this court has
 20 authority to hear.

21 **I. Plaintiff may Proceed in forma pauperis**

22 Under 28 U.S.C. § 1914(a), a filing fee is required to commence a civil action in federal court.
 23 The court may authorize the commencement of an action without prepayment of fees and costs or
 24 security therefore, by a person who submits an affidavit that includes a statement showing the person is
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1 unable to pay such costs. *See* 28 U.S.C. § 1915(a)(1). The standard governing *in forma pauperis*
 2 eligibility under 28 U.S.C. § 1915(a)(1) is “unable to pay such fees or give security therefor.”
 3 Determination of what constitutes “unable to pay” or unable to “give security therefor” and, therefore
 4 whether to allow a plaintiff to proceed *in forma pauperis*, is left to the discretion of the presiding judge,
 5 based on the information submitted by the plaintiff or plaintiffs. *See, e.g., Fridman v. City of New York*,
 6 195 F. Supp. 2d 534, 536 (S.D.N.Y.), *aff’d*, 52 Fed .Appx. 157 (2nd Cir. 2002).

7 Pursuant to 28 U.S.C. § 1915(a)(1), Plaintiff submitted a financial affidavit. (#1). Plaintiff is
 8 currently unemployed, though she received commissions from a company that is no longer in business
 9 sometime within the past 12 months. (*Id.* at 1). She received approximately \$600 in donations this
 10 month from people she has “shared energy work with.” (*Id.*). Her regular monthly expenses total more
 11 than \$1,200.00. (*Id.* at 2). She is currently \$900.00 behind on rent and owes a friend \$2,000.00. (*Id.*).
 12 Therefore, Plaintiff’s Application to proceed *in forma pauperis* is granted.

13 **II. Whether Plaintiff’s Complaint is Frivolous, Malicious, or Fails to State a Plausible Claim**

14 Because the court grants Plaintiff’s application to proceed *in forma pauperis*, it must review
 15 Plaintiff’s complaint to determine whether the complaint is frivolous, malicious, or fails to state a
 16 plausible claim. *See* 28 U.S.C. § 1915(e). The court’s review of Plaintiff’s complaint is guided by two
 17 legal standards: Federal Rule of Civil Procedure 8 and the Supreme Court’s decision in *Haines v.*
 18 *Kerner*, 404 U.S. 519, 520 (1972).

19 ***A. Legal Standard***

20 Federal Rule of Civil Procedure 8(a) provides that a complaint “that states a claim for relief must
 21 contain . . . a short and plain statement of the claim showing that the [plaintiff] is entitled to relief.” FED.
 22 R. Civ. P. 8(a)(2). The Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) states
 23 that in order to satisfy Rule 8’s requirements a complaint’s allegations must cross “the line from
 24 conceivable to plausible.” 556 U.S. at 680. The Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550
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1 U.S. 544, 556 (2007) and *Iqbal* prescribe a two-step procedure for determining whether a complaint's
2 allegations cross that line.

3 First, the court must identify “the allegations in the complaint that are not entitled to the
4 assumption of truth.” *Iqbal*, 556 U.S. at 679, 680. Factual allegations are not entitled to the assumption
5 of truth if they are “merely consistent with liability,” *Id.* at 678, or “amount to nothing more than a
6 ‘formulaic recitation of the elements’ of a constitutional” claim. *Id.* at 681.

7 Second, the court must determine whether the complaint states a “plausible” claim for relief. *Id.*
8 at 679. A claim is “plausible” if the factual allegations, which are accepted as true, “allow[] the court to
9 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. This
10 inquiry is “a context-specific task that requires the reviewing court to draw on its judicial experience and
11 common sense.” *Id.* at 679 (citation omitted). If the factual allegation, which are accepted as true, “do
12 not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—
13 but it has not “show[n]”—“that the pleader is entitled to relief.” *Id.* (citing FED. R. CIV. P. 8(a)(2)).

14 However, in evaluating whether a plaintiff has met a pleading standard, courts are directed to
15 hold *pro se* litigants to “less stringent standards.” See *Haines*, 404 U.S. at 520; *Hughes v. Rowe*, 449
16 U.S. 5, 10 n. 7 (1980). *Pro se* complaints “should not be dismissed for failure to state a claim unless it
17 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
18 entitle him to relief.” *Hughes*, 449 U.S. at 10 (citing *Haines*, 404 U.S. at 520-521). When a court
19 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with
20 directions as to curing its deficiencies, unless it is clear from the face of the complaint that the
21 deficiencies could not be cured by amendment. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir.
22 1995) (internal citation omitted).

B. Analyzing Plaintiff's Complaint for Jurisdiction

“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). There are two statutory bases for a federal court’s jurisdiction: federal question jurisdiction and diversity jurisdiction. Federal courts have federal question jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Plaintiff does not bring this case to federal court based on federal question jurisdiction. Plaintiff’s one claim in her Complaint (#1-2) is for breach of contract. A breach of contract claim arises under state law. *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007). It does not implicate a federal question on its face. *Id.*

In addition to federal question jurisdiction, federal courts have diversity jurisdiction over “civil actions where the matter in controversy exceeds the sum or value of \$75,000...and is between (1) citizens of different states.” 28 U.S.C. § 1332. “The amount in controversy alleged by the proponent of federal jurisdiction-typically the plaintiff in the substantive dispute-controls so long as the claim is made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.” *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106 (9th Cir. 2010) (citing *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1131 (9th Cir. 2000)).

Plaintiff alleges \$200,000 in compensatory damages. (#1-2 at 5). This covers three-and-a-half years of work (*Id.* at 3: ¶1), providing a good-faith basis for the amount. It is not a legal certainty that the claim is actually worth less than \$75,000. The amount in controversy satisfies the requirement for diversity jurisdiction.

28 U.S.C. § 1332 requires complete diversity, *i.e.*, no plaintiff may be a citizen of the same state as any defendant. *See Lincoln Prop Co. v. Roche*, 546 U.S. 81, 82 (2005) (citing *Strawbridge v. Curtis*, 7

1 U.S. 267 (1806)). In determining whether the parties are citizens of different states, the court looks to
 2 the parties' domiciles.

3 For the purposes of diversity jurisdiction, a United States citizen is
 4 considered a citizen of the state in which he is domiciled. A person is
 5 domiciled in a location when he has established a fixed habitation or
 6 abode in a particular place, and [intends] to remain there permanently or
 indefinitely. In determining diversity, the relevant domicile is the one at
 the time of the lawsuit's filing.

7 *Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 823, 826 (D. Nev. 1988) (internal quotation marks
 8 omitted). Plaintiff alleges that she is a Nevada resident. (#1-2 at 1).

9 Where a corporation is a party, section 1332(c)(1) provides that the "corporation shall be deemed
 10 to be a citizen of any State by which it has been incorporated **and** of the State where it has its principal
 11 place of business." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996) (emphasis added). Plaintiff alleges
 12 that the principal place of business, or the "nerve center," for Angioprim is Florida. (#1-2 at 2: ¶3a). This
 13 is based on the location of the manager's home, where he does business. (*Id.*). No state of incorporation
 14 is listed for Angioprim. (*Id.*). Plaintiff alleges that, "[a]lthough the state of Minnesota shows Ionetics,
 15 Inc. to be inactive, the principle business of Ionetics, Inc. consists of water filter products assembled and
 16 shipped by Nelsen Corporation headquartered in Norton, Ohio." (*Id.* at 2: ¶3b). Plaintiff alleges that
 17 Cardioprim is an inactive Minnesota corporation. (*Id.* at 2: ¶3c). On its face, the Complaint states
 18 sufficient basis for find that these Defendants are not citizens of Nevada. These three defendants fulfill
 19 the requirement for diversity jurisdiction.
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21 Plaintiff's allegations for the domicile of the two individual defendants are insufficient on their
 22 face. Plaintiff alleges that Defendant Snee had an Arizona driver's license at the "time of the Cause of
 23 Action." (#1-2 at 2: ¶1). However, the relevant period is the time that the Complaint was filed. *Abbott*,
 24 718 F. Supp. at 826. Plaintiff lists Defendant's residence as a Nevada address in the Complaint. (#1-2 at
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1 1). Plaintiff's assertion that "Diversity is maintained," (*Id.*) carries no weight, as it is a legal conclusion
2 unsupported by the facts. *Iqbal*, 556 U.S. at 678. Though Plaintiff is held to a less stringent standard due
3 to her *pro se* status, the burden is on her to establish diversity citizenship. *Hertz Corp. v. Friend*, 559
4 U.S. 77, 96 (2010). She has not met this burden.

5 Plaintiff alleges Defendant Ngyen is a Vietnamese immigrant, and that, as a resident alien, she
6 cannot be considered a citizen of Nevada. (#1-2 at 2: ¶2). However, Congress dictated the exact opposite
7 outcome when it amended the statute defining diversity jurisdiction in 1988. Judicial Improvements and
8 Access to Justice Act, Pub. L. No. 100–702, § 203, 102 Stat. 4642, 4646 (1988). As amended, 28 U.S.C.
9 § 1332 states, "district courts shall not have original jurisdiction under [diversity jurisdiction] of an
10 action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted
11 for permanent residence in the United States and are domiciled in the same State." Plaintiff does not
12 make any allegations regarding the legal status of Defendant Ngyen. Under the facts of the Complaint,
13 Defendant Ngyen is a resident of Nevada. (#1-2 at 1). Even if she is a citizen of Vietnam, she is treated
14 as a citizen of the state of Nevada if she is a legal permanent resident.
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16 This action is brought to the court based on diversity jurisdiction, which requires complete
17 diversity. 28 U.S.C. § 1332. Because two of the parties do not fit the qualifications for diversity
18 jurisdiction, the court recommends that Plaintiff's Complaint (#1-2) be dismissed with prejudice. It is
19 impossible to cure the subject-matter jurisdiction deficiencies in the Complaint by amendment. *See*
20 *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 & 574-575 (2004) ("[J]urisdiction
21 depending on the condition of the party is governed by that condition, as it was at the commencement of
22 the suit...Unless the Court is to manufacture a brand-new exception to the time-of-filing rule, dismissal
23 for lack of subject-matter jurisdiction is the only option available in this case.") (internal citation
24 omitted).
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1 ACCORDINGLY, and for good cause shown,

2 IT IS ORDERED that Plaintiff's Application to proceed *in forma pauperis* (#1) is GRANTED.

3 IT IS FURTHER ORDERED that Plaintiff is permitted to maintain the action to conclusion
4 without the necessity of prepayment of any additional fees, costs, or security. This order granting *in*
5 *forma pauperis* status does not extend to the issuance of subpoenas at government expense.

6 IT IS FURTHER ORDERED that the Clerk of Court file the complaint.

7 IT IS RECOMMENDED that Plaintiff's Complaint (#1-2) be DISMISSED WITH PREJUDICE
8 for lack of subject-matter jurisdiction.

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10 **NOTICE**

11 Pursuant to Local Rules IB 3-1 and IB 3-2, a party may object to orders and reports and
12 recommendations issued by the magistrate judge. Objections must be in writing and filed with the Clerk
13 of the Court within fourteen days. LR IB 3-1, 3-2. The Supreme Court has held that the courts of appeal
14 may determine that an appeal has been waived due to the failure to file objections within the specified
15 time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file
16 objections within the specified time and (2) failure to properly address and brief the objectionable issues
17 waives the right to appeal the District Court's order and/or appeal factual issues from the order of the
18 District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch.*
19 *Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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1 Pursuant to Local Special Rule 2-2, the Plaintiff must immediately file written notification with
2 the court of any change of address. The notification must include proof of service upon each opposing
3 party of the party's attorney. **Failure to comply with this Rule may result in dismissal of the action.**
4 *See* LSR 2-2.

5 DATED this 14th day of April, 2015.

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8 CAM FERENBACH
9 UNITED STATES MAGISTRATE JUDGE
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